

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF INDEPENDENCE**

In Re: The Conditional Use Permit
Of James J. Dunn

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

Administrative Law Judge Bruce H. Johnson (the ALJ) conducted a hearing in this contested case proceeding beginning at 9:30.m. on Wednesday, March 22, 2000, at the City Council Chamber, Independence City Hall, 1920 County Road 90, Maple Plain, Minnesota.

Jeffrey A Carson, Attorney at Law, of the firm of Carson, Clelland & Schreder, 6300 Shingle Creek Parkway, Suite 305, Minneapolis, Minnesota 55430, represented the City of Independence (the City) at the hearing. Richard M. Carlson, Attorney at Law, of the firm of Morris, Carlson & Hoelscher, P.A., Suite 200, 7380 France Avenue South, Edina, Minnesota 55435, represented the Permittee, James J. Dunn, at the hearing. The record closed on May 12, 2000, when the ALJ received the parties' post-hearing response briefs.

This Report is a recommendation, not a final decision. The City Council of the City of Independence will make the final decision after reviewing this Report and the hearing record. The City Council may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The City Council will not make its final decision until after the parties have had access to this Report for at least fifteen (15) days. During that time, the City Council must give each party adversely affected by this Report an opportunity to file objections to the report and to present argument. Parties should contact the office of Toni Hirsch, City Clerk, City of Independence, Independence City Hall, 1920 County Road 90, Maple Plain, Minnesota 55359, to find out how to file objections with or present argument to the City Council.

STATEMENT OF THE ISSUES

Mr. Dunn holds a conditional use permit to use certain buildings on his property for boat storage. In December 1998 he and the City signed a Stipulation ending a civil action that the City had brought in district court. The City claimed that Mr. Dunn had violated the State Building Code^[1] and other state laws by allowing certain conditions to exist on his property and by continuing to occupy it in violation of a "No Occupancy Notice." The Stipulation did not specifically require Mr. Dunn to obtain a building permit before beginning the required repairs. The City now proposes to revoke Mr. Dunn's conditional use permit claiming he has violated both the Stipulation and his conditional use permit.

(1) Was Mr. Dunn required to apply for a building permit before making any repairs to his storage buildings?

(2) Can Mr. Dunn obtain a building permit for the repairs specified in the Stipulation?

(3) Can the City enforce the clean-up provisions of the Stipulation against Mr. Dunn? and

(4) Has Mr. Dunn substantially complied with the terms of his conditional use permit?

SUMMARY

The requirement that Mr. Dunn obtain a building permit before making any repairs to his storage barns was implicit in the Stipulation that the parties signed in December 1998. On the other hand, the repairs described in the Stipulation do not meet the State Building Code's requirements, so the City could not have issued him a building permit to perform that work. Since the Stipulation called for Mr. Dunn to do repair work that would have been illegal, neither party can enforce the Stipulation against the other. Finally, Mr. Dunn has substantially complied with the terms of his conditional use permit, so it should not be revoked.

Based upon the record in this matter, the ALJ makes the following:

FINDINGS OF FACT

1. The City of Independence is a municipality and political subdivision of the State of Minnesota, located in the County of Hennepin. The City is governed by a Mayor and a City Council, which meets every two weeks. Toni Lee Hirsch is currently its City Clerk and chief administrative officer.^[2] The City contracts with Thomas G. Loucks to serve as its consultant City Planner.^[3] The City also contracts with the firm Metro West Inspection to supply the City with the building official^[4] that state law requires it to appoint.^[5] Metro West Inspection is currently supplying one of its employees, Bruce Satek, to serve as the City's building inspector.^[6]

2. James J. Dunn, is a citizen of the State of South Carolina, but during the times that are relevant to this proceeding he has owned property within the City's limits and has also maintained a residence in the State of Minnesota.

3. On July 13, 1982, the Independence City Council adopted Ordinance No. 88G which amended the City's zoning Ordinance No. 88 by adding a conditional use permit for agricultural storage barns.^[7] In so doing, the City Council found that:

. . . consolidation of farms into larger holdings and the conversion of livestock farms to the production of grain, the raising of horses, and other uses, has resulted in the discontinued use of large livestock barns.

It is one of the purposes of this ordinance to provide an economical use for large livestock barns while maintaining the agricultural character of the area, avoiding traffic congestion, avoiding the burdening of the road system, and avoiding the noise and dust associated with automobile and truck traffic.^[8]

4. In August 1982, Steve Pauly owned a 15.7-acre parcel of land at 1915 Copeland Road, Independence, Minnesota (the "subject property" or "the property").^[9] There were three barns, which had been previously used for agricultural purposes, located on the subject property, namely: a 30-foot by 40-foot lean-to and two 70-foot by 220-foot turkey barns. All three were pole buildings with timber frames, galvanized steel roofing and siding, and dirt floors.^[10]

5. On August 10, 1982, Mr. Pauly appeared before the City Council and requested a conditional use permit to begin using the three barns on the subject property for boat storage. On that day and upon the recommendation of the City Planning Commission, the City Council granted Mr. Pauly the conditional use permit that he had requested, subject to the following nine conditions:^[11]

1. Speed to be kept to a minimum in transporting boats to and from storage buildings to lessen the dust
2. The property to be kept in neat condition
3. No advertising signs

4. Security light to be shielded to minimize spillage onto adjacent property
5. No outside storage
6. No repairs and maintenance to be done at this location
7. Conditional use permit to expire on sale of the property or if an effort is made to use the property for another purpose
8. Hours of operation 8:00 a.m. to 6:00 p.m. Monday through Friday
9. To be reviewed yearly

6. Sometime in the early 1980s, James J. Dunn, who is the owner and operator of the Lakeside Marina on Lake Minnetonka in Hennepin County, Minnesota, became Mr. Pauly's successor in interest of the subject property and the conditional use permit.^[12]

7. Mr. Dunn serves about 1,500 to 2,000 boats per year at his marina, and he provides storage for 400 to 500 of them at various locations during the winter. Each year since becoming owner of the subject property, Mr. Dunn has placed about 110 to 115 boats, ranging in length from 17 to 50 feet, into winter storage in the turkey barns located on the subject property.^[13]

8. Typically since the early 1980s, Mr. Dunn begins transporting boats to the subject property in October. Boats that are to be placed on blocks are normally stored in the rear of the structures, while those that are to be stored on their trailers are located near the doors. Since the boats need to be stored in a particular sequence, some are staged outside the turkey barns for brief periods of time. The boats are brought back out of storage and transported to the marina from about April through June. Occasionally some boats are staged in the open while waiting to be transported for maintenance and service. After the boats are taken out of storage, the blocking material and boat trailers are placed back in the turkey barns until the storage season begins again in the fall.^[14]

9. From the early 1980s until the spring of 1997, no issues arose between Mr. Dunn and the City concerning his compliance with the conditions of his conditional use permit.^[15]

10. In late March or early April 1997, heavy, wet snow accumulated on the roof of the turkey barns during a storm. The snow caused a 40 to 60-foot section of roof on one of the barns to collapse onto about twenty-five boats that were stored there.^[16]

11. After the roof collapse, Mr. Dunn began removing the debris from the collapse and the damaged boats in a way that minimized any further damage to the boats. He stockpiled the debris on the subject property near the damaged turkey barn. This process took approximately two months.^[17] When Mr. Dunn began removing debris from the collapse, there was already other debris on the property that had

accumulated over the years, including some agricultural debris that had accumulated before 1982.

12. On or about April 25, 1997, and before debris from the collapse and the damaged boats had been removed, Thomas Loucks, the City's contract Planning and Zoning Administrator, inspected the subject property.^[18] Mr. Loucks observed the collapsed roof, and about a month later he asked Loren Kohnen, one of the City's contract building inspectors, to inspect the structure to determine whether it was usable for boat storage purposes and if any repairs needed to be made to bring it into compliance with the conditional use permit.^[19]

13. On June 11, 1997, Mr. Loucks again contacted Mr. Kohnen to determine whether he had inspected the subject property.^[20] Mr. Kohnen replied to Mr. Loucks on June 17, 1997. The former stated that he had inspected the subject property, but he did not indicate whether the damaged turkey barn was still usable for storage purposes nor whether any repairs were necessary to bring it into compliance with the conditional use permit. Rather Mr. Kohnen told Mr. Loucks that because the turkey barns did not meet the State Building Code requirements for storage buildings, the City should never have issued the conditional use permit in the first place. For that reason and not necessarily because of any damage to the structure, Mr. Kohnen recommended that the City cancel the conditional use permit.^[21]

14. During the summer and fall of 1997 Mr. Dunn had the debris from the roof collapse gathered into piles on the ground, but he had very little of it, if any, removed from the property.^[22] In early fall 1997, Bruce Satek, another of the City's contract building inspectors, inspected the property to see if any boats were being stored there. Mr. Satek saw that boat trailers were being stored in the two turkey barns and that two boats were being stored in the lean-to. He did not make a report of any debris that he may have seen on the property.^[23]

15. During 1997 neither Mr. Satek, Mr. Loucks, Mr. Kohnen, nor anyone else on the City's behalf had any contact with Mr. Dunn about the condition of the property, and at no time did the City instruct Mr. Dunn not to use the structures for boat storage during the winter of 1997-1998.^[24] Mr. Dunn therefore proceeded to use the undamaged turkey barn and the undamaged part of the damaged turkey barn for boat storage during that storage season. That winter only one or two of the boats in storage were not covered by a roof.^[25]

16. In the spring of 1998 Mr. Dunn began to remove some of the debris and trash from the property.^[26] On July 21, 1998, Mr. Loucks wrote to Mr. Dunn indicating that the subject property "has been inspected and it has been determined that the buildings are so dilapidated and unsafe and the general premises are in a state of such disrepair, that your (sic) in violation of your conditional use permit.^[27] Mr. Loucks went on to say that he was going to recommend that the City Council revoke Mr. Dunn's conditional use permit at the Council's July 28, 1998, meeting.

17. In response to Mr. Loucks' letter, Mr. Dunn called him on July 24, 1998, and indicated his belief that the boat storage problem could be resolved.^[28] The two of them arranged to meet on the afternoon of July 28th prior to the City Council Meeting.^[29] At that meeting Mr. Dunn indicated that he would like to repair the buildings so that he could continue to use them for boat storage.^[30]

18. Although Mr. Dunn did not attend the City Council's July 28, 1998, meeting, Mr. Loucks did attend, and communicated Mr. Dunn's desire to repair the storm damage.^[31] Since there was a diversity of opinion among the Mayor, the Council members, and the City Attorney about what to do about the subject property and Mr. Dunn's conditional use permit, the issue was tabled until the City Council's August 11, 1998, meeting.^[32] At that time Mr. Dunn verbally agreed that he would not use the buildings for storage until repairs had been completed.^[33]

19. Mr. Dunn appeared at the City Council meeting on August 11, 1998, to respond to the recommendation that his conditional use permit be denied.^[34] At that time the City's building inspectors again recommended that the permit be denied because the structures did not meet current State Building Code requirements for storage buildings; they also expressed some safety concerns about the building that had been damaged by the 1997 storm.^[35] Mr. Dunn indicated that he would like either to restore the buildings to usable condition or to replace them with new buildings. The City Council indicated that it would not allow Mr. Dunn to replace the buildings on the property with new ones. Rather it directed Mr. Loucks and the City's building inspectors to work with Mr. Dunn to determine what repairs would have to be made to the structures in order for them to meet current State Building Code requirements. The Council then tabled the matter until its next meeting.^[36]

20. The City Council took the matter up again at its August 25, 1998, meeting. Before that meeting Mr. Loucks had another meeting with Mr. Dunn during which Mr. Dunn agreed not to use the turkey barns for boat storage until after the storm damage had been repaired.^[37] Also before that City Council meeting, Mr. Satek made his second inspection of the property. He reported that the buildings were still being used as storage for boat trailers but, again, made no report about any debris that may have been on the premises at that time.^[38]

21. Mr. Dunn attended the August 25, 1998, City Council meeting at which the following matters were discussed, among other things.^[39]

- a. Mr. Loucks told the City Council that the turkey barns had met State Building Code requirements for storage building when they were originally constructed but that they did not meet current Code requirements.
- b. The City's building inspectors reiterated their position that the conditional use permit should be revoked because the turkey barns do not comply with current State Building Code requirements for storage buildings. Those inspectors also expressed safety concerns but did

not actually express a conclusion that any of the buildings were “hazardous,” within the meaning of state law.^[40]

- c. Mr. Dunn stated that he had removed about 120 tons of debris from the subject property and that another 60 tons remained to be removed. He also expressed his desire either to repair the building for continued use as boat storage structures or to replace them with new buildings for the same purpose.

22. At its August 25, 1998, meeting the City Council again did not take any action on Mr. Dunn’s conditional use permit, nor did it direct the City to take any further steps to resolve the problem. Rather the City Council tabled the matter indefinitely.^[41]

23. In September 1998 Mr. Dunn again began preparations to store boats in the turkey barns for the winter of 1998-1999.^[42] Mr. Loucks saw this activity and reported it to Mr. Satek.^[43] In response, Mr. Satek made his third inspection of the property on September 30, 1998, and found someone pulling boat trailers out of one of the buildings. Mr. Satek posted “no occupancy notices” on all three of the buildings located on the property.^[44] That same day, Mr. Loucks informed Mr. Dunn that there was evidence that Mr. Dunn had violated his verbal agreement not to use the turkey barns for boat storage until the issue of repairs had been resolved. He also told Mr. Dunn that he had directed Mr. Satek to post the buildings for no occupancy.^[45] Mr. Loucks did not raise the issue with Mr. Dunn about debris being on the property.^[46]

24. On October 26, 1998, the City began a civil action against Mr. Dunn in Hennepin County District Court. The City’s complaint alleged, among other things, that Mr. Dunn had continued to maintain and occupy a hazardous building in violation of Minnesota law, that he had violated provisions of the Minnesota Building Code,^[47] and that he had violated the City building inspector’s no occupancy notice.^[48]

25. Thereafter, the City and Mr. Dunn resolved the pending civil action in a settlement that was memorialized in a Stipulation that the parties signed in December 1998. That Stipulation contained the following terms.^[49]

“1. Defendant shall proceed to correct and repair the buildings located on subject property (1915 Copeland Road, Independence) as outlined by his engineer, Robert L. Tibbits, in correspondence dated October 31, 1998; that said correspondence from Engineer Tibbits with attachments (total of 6 pages) shall be attached hereto as Exhibit A.”

“2. Plaintiff (sic) shall be able to continue the use of his property for a period of 12 years from the date of this Stipulation; thereafter, Plaintiff (sic) shall bring his property and buildings into compliance with the Zoning and Building Codes existing at that time (following the 12-year amortization).”

“3. The City will authorize the above-referenced repairs and will inspect for compliance with the Tibbits correspondence.”

“4. Defendant shall clean up his property and bring it into compliance with the City Code relating to the storage of debris, undergrowth, and other nuisance related issues, which cleanup shall be completed on or before July 30, 1999.”

“5. Defendant shall provide the City with a \$5,000 irrevocable letter of credit to guarantee the above-referenced cleanup; that the letter of credit may not expire without a 10-day written notice to the City.”

“6. Defendant may commence the repairs outlined in this Agreement immediately upon execution of this document by all parties; a facsimile signature is acceptable while the original is being circulated.”

“7. The parties agree that this Stipulation shall be submitted to the Court for its approval and Order.”

26. Mr. Loucks, the City's Planning & Zoning Administrator, was involved in negotiating the Stipulation for the City. And the Stipulation was signed by Ms. Hirsch, the City Clerk, and by the Mayor on behalf of the City. But neither Mr. Satek nor any of the City's other building inspectors were consulted during the settlement negotiation, and none of them saw the terms of the Stipulation until after it was executed by the City.^[50]

27. Since the Stipulation did not prevent him from doing so, Mr. Dunn did use the property for boat storage during the winter of 1998-1999. Beginning in the spring of 1999 and continuing until early June, he brought the boats out of storage and transported them to the marina. Mr. Dunn then resumed cleaning up the property and began making the building repairs described in the Stipulation.^[51] On June 3, 1999, Mr. Satek made another inspection of the property.^[52] He observed some debris on the property, consisting of cement blocks, wood pallets, gas tanks, a car, car batteries, scrap metal, and piles of wood. Mr. Satek also noted that Mr. Dunn had begun to make repairs on the buildings, but he did not then raise the issue of whether Mr. Dunn was required to have a building permit to do those repairs.^[53]

28. In July 1999 Mr. Dunn called Mr. Satek and asked him to inspect the property to determine whether the repairs that Mr. Dunn was making conformed to the requirements of the Stipulation.^[54] Indicating that he could only give an opinion whether the repairs met the requirements of the State Building Code and a building permit, Mr. Satek declined that request because Mr. Dunn had not obtained a building permit to do the repairs specified in the Stipulation.^[55] And by letter dated August 5, 1999, Mr. Satek advised Mr. Dunn would have to obtain a building permit before continuing with the repair work.^[56]

29. On August 24, 1999, Mr. Loucks inspected the property and noted that some trash and debris still remained. This was followed by another inspection by Mr. Satek on September 22, 1999. He also saw some debris on the property^[57] and observed that repairs were still being done to one of the turkey barns.^[58] Although Mr.

Dunn was still doing the repair work without a building permit, the repairs did conform to specifications that the parties had signed in December 1999.^[59] Because Mr. Dunn lacked a building permit for the work, Mr. Satek posted a Stop Work order at the site on September 22, 1999.

30. Although there was still some trash and debris on the property by the end of September 1999, a large portion of it had been removed, and none could be seen from the road.^[60]

31. On October 4, 1999, building inspector Bruce Satek met with Mr. Dunn at the property and indicated what work would have to be done to the two turkey barns to make them conform to State Building Code requirements for storage buildings.^[61] And on October 6, 1999, Messrs. Kohnen and Satek sent a memorandum to the City that listed seven things that Mr. Dunn would have to do in order to obtain a building permit.^[62] None of those seven things nor any of the work discussed with Mr. Dunn on October 4th was covered in the Stipulation that the parties had signed in December 1999.^[63]

32. At the insistence of the City's building inspectors, an officer of the West Hennepin Public Safety Department issued Mr. Dunn two citations on October 20, 1999, one for violating his conditional use permit and the other for maintaining a public nuisance.^[64] And on November 23, 1999, the City Council directed the City to initiate an administrative contested case proceeding to revoke Mr. Dunn's conditional use permit.^[65]

33. On December 7, 1999, Mr. Dunn did apply for a building permit to make repairs to the two turkey barns on the property.^[66] But two days later the City advised him that it was in the process of beginning a contested case proceeding to revoke his conditional use permit and would not take action on his permit application until after the proceeding was completed.^[67]

34. On February 1, 2000, the City issued a notice of hearing to Mr. Dunn and his attorney, and this contested case proceeding ensued.

35. Mr. Satek inspected the property on March 21, 2000. As of that date, Mr. Dunn had generally done a good job of cleaning up the property, and there were only a few cleanup items that needed to be addressed.^[68] The property is in neater condition than some other similar properties within the City limits.^[69] The property has generally been neatly mowed since 1998.^[70]

36. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

37. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law^[71] gives the Administrative Law Judge and the Independence City Council authority to conduct this proceeding, to consider whether Mr. Dunn's conditional use permit should be revoked, and to make findings, conclusions, and orders on that subject.

2. The City gave Mr. Dunn proper and timely notice of the hearing in this matter, and the City has complied with all of the law's substantive and procedural requirements.

3. Minnesota law gives municipalities the authority to regulate the uses of real property within their jurisdictions through planning and zoning.^[72]

4. The City of Independence is a municipality within the meaning of the state's municipal planning and zoning legislation.^[73]

5. Minnesota law and City ordinance gave the City Council authority to issue a conditional use permit to Mr. Dunn's predecessor in interest to use structures on the subject property for boat storage subject to certain agreed upon conditions.^[74]

6. Minnesota law provides that:

[a] conditional use permit shall remain in effect as long as the conditions agreed upon are observed, but nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses.^[75]

7. State law requires the City to enforce the State Building Code with respect to "new construction" within its jurisdiction.^[76] In rules properly adopted by the Commissioner of the Minnesota Department of Administration, the term "new construction" is further defined as "the construction, alteration, moving, demolition, repair, and use of any building or structure within a municipality . . .," with a few exceptions that are not germane here.^[77]

8. The City does not have the legal authority to grant Mr. Dunn a variance from State Building Code requirements. Its building inspectors may only grant modifications of Code requirements when there is "a special individual reason [that] makes the strict letter of the code impractical . . ."^[78] Neither party has made the showing required by the State Building Code of a special individual reason that made strict compliance with the Code impractical in connection with repairs to the storage barns at issue here.

9. The state law requirement that Mr. Dunn obtain a building permit to perform repairs on the storage barns was implicit in the Stipulation that the parties signed in December 1998.^[79]

10. The Stipulation explicitly directs Mr. Dunn to perform repair work on the storage barns that does not comply fully with the State Building Code and would therefore be illegal. The Stipulation is therefore void and unenforceable by either party.^[80]

11. The City failed to prove by a preponderance of the evidence that Mr. Dunn failed to substantially perform any of all of his obligations under the conditional use permit, and the City may therefore not revoke that permit.^[81]

12. The City failed to allege or prove by a preponderance of the evidence that any of the storage sheds on the property were "hazardous buildings" within the meaning of Minnesota law^[82] and were therefore subject to removal.^[83]

13. Mr. Dunn may not proceed with any repairs to his storage barns without first obtaining a building permit and without complying fully with the State Building Code, subject to any modifications to Code provisions that the City's building inspector may make in accordance with Minnesota law.^[84]

14. The Administrative Law Judge adopts as Conclusions any Findings which are more appropriately described as Conclusions.

15. The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Independence City Council not revoke Mr. Dunn's conditional use permit.

Dated this 25th day of May 2000.

S/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Under Minnesota law,^{[\[85\]](#)} the City Council must serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

I. Disputed Facts

There were only two significant disputes about the facts, namely: (1) whether the City advised Mr. Dunn as early as 1997 that the conditions on the his property represented a problem; and (2) whether Mr. Dunn agreed not to use the storm-damaged turkey barn for boat storage during the winter of 1997-1998. Those facts are important in determining the extent to which Mr. Dunn was tardy in responding to the City's directive to clean up his property and in determining whether he was guilty of bad faith in dealing with the City. For the reasons that follow, the ALJ found that the City's first direct contact with Mr. Dunn about conditions on his property occurred in August 1998 when Mr. Dunn made a verbal agreement not to use the damaged turkey barn for storage until after it was repaired. His agreement not to use the damaged structure for storage therefore referred to the 1998-1999 storage season.

Mr. Dunn's name and a Florida address did appear on two of the City's 1997 internal memoranda concerning conditions on the property.^[86] But neither memorandum identified Mr. Dunn as an addressee, and no testimony established that the City sent a copy of either to Mr. Dunn.^[87] Next, Mr. Loucks testified that he had a telephone conversation with Mr. Dunn in 1997, and that Mr. Dunn verbally agreed then that he would not use the subject property for boat storage until he had made repairs to the damaged turkey barn.^[88] On the other hand, Mr. Dunn did not recall having any contact with the City in 1997. The ALJ does not doubt that Mr. Dunn verbally agreed not to use the subject property for boat storage until the damaged barn was repaired, but the ALJ is persuaded that that conversation occurred in 1998 rather than in 1997. First, Mr. Dunn specifically recalled having the conversation that Mr. Loucks reported but in August 1998.^[89] And Mr. Dunn's recollection of the time is supported by other evidence. The City's building inspector did recommend to the City as early as December 1997 that repairs be made to the damaged turkey barn before using it to store boats over the winter of 1997-1998. But there is no evidence that the City communicated that recommendation to Mr. Dunn at that time. Actually, the building inspector's position in 1997 was that Mr. Dunn not be allowed to repair the structures, since neither turkey barn met the current State Building Code requirements for boat storage. In other words, the building inspector believed in 1997 that the City should simply cancel Mr. Dunn's conditional use permit. In short, throughout 1997 the City had no specific repair recommendations that Mr. Loucks could have discussed on the telephone with Mr. Dunn.

In fact, there is no reliable evidence that anyone from the City had contact with Mr. Dunn about conditions on his property before July 21, 1998, roughly fifteen months after the storm damage occurred. On that date Mr. Loucks sent Mr. Dunn a letter indicating that the subject property "has been inspected and it has been determined that the buildings are so dilapidated and unsafe and the general premises are in a state of such disrepair, that your (sic) in violation of your conditional use permit."^[90] It is more likely that Mr. Loucks discussed not using the damaged building for storage sometime

after giving Mr. Dunn initial notice in July 1998 that the City considered his storage buildings to be a problem.

II. Mr. Dunn Must Obtain a Building Permit Before Making Any Repairs to His Storage Buildings

State law requires cities to enforce the State Building Code within their respective jurisdictions:

The State Building Code applies statewide and supersedes the building code of any municipality. The State Building Code does not apply to agricultural buildings except with respect to state inspections required or rulemaking authorized by sections 103F.141, 216C.19, subdivision 8, and 326.244. All municipalities shall adopt and enforce the State Building Code with respect to new construction within their respective jurisdictions.^[91]

While the statute appears to apply only to “new construction,” the legislature has elsewhere required the Commissioner of Administration to adopt rules having the force of law that also make the State Building Code applicable to “reconstruction, alteration, and repair of buildings.”^[92] The Commissioner has done that in Minnesota Rules, Chapter 1300, and has specifically made the State Building Code applicable to “the construction, alteration, moving, demolition, repair, and use of any building or structure within a municipality . . .,” with a few exceptions that are not germane here.^[93]

The only major exception that the legislature and Commissioner have made to uniform application of the State Building Code is for “agricultural buildings.”^[94] Although the structures at issue here were first constructed as turkey barns, the ALJ concludes that they lost their character as agricultural buildings when the City gave Mr. Dunn’s predecessor in interest a conditional use permit to use them as boat storage sheds^[95] and he began using them for that purpose. The legislature has defined “agricultural buildings” as”

. . . a structure on agricultural land as defined in section 273.13, subdivision 23, *designed, constructed, and used* to house farm implements, livestock, or agricultural produce or products used by the owner, lessee, and sublessee of the building and members of their immediate families, their employees, and persons engaged in the pickup or delivery of agricultural produce or products.^[96] [Emphasis supplied.]

In other words, in order to qualify as an agricultural building, a structure must meet the conjunctive requirements of being designed, constructed, *and* used for that purpose. So even though the structures in question may have been designed and constructed as turkey barns, they were no longer exempt from the State Building Code when they began to be used as boat storage sheds.

The State Building Code itself requires that anyone making repairs to a structure must first obtain a building permit from the local building inspector:

Except as specified in Section 106.2, no building or structure regulated by this code shall be erected, constructed, altered, *repaired*, moved, improved, removed, converted or demolished unless a separate permit for each building or structure has first been obtained from the building inspector.^[97] [Emphasis supplied.]

So, state law requires that Mr. Dunn obtain a building permit before making any repairs to the structures in question. And there is nothing in the State Building Code that allows municipalities to grant variances from the Code's requirements, including the requirement of a building permit.^[98]

In October 1998 the City began a civil action against Mr. Dunn in district court alleging, among other things, that he had been maintaining a hazardous building and had violated the State Building Code.^[99] That civil action was settled and dismissed in accordance with a Stipulation that both parties signed in December 1998.^[100] A Stipulation that settles a lawsuit is contractual in nature, and its formation, interpretation, and enforcement are all governed by traditional principals of contract law.^[101]

Among other things, the Stipulation in question required Mr. Dunn to make repairs to the structures on the property as described in a six-page letter he had obtained from a consulting engineer, Robert L. Tibbits (the "Tibbits repairs"). But the Stipulation was silent on whether Mr. Dunn first had to obtain a City building permit before making those repairs. Taking the position that he was not required to obtain a building permit, Mr. Dunn began making repairs without one. And he continued with the repairs until he was stopped by a City building inspector, who issued a stop work order because Mr. Dunn had no building permit. Subsequently, in December 1999 Mr. Dunn did apply for a building permit for the repairs. The City has yet to take action on that application because this contested case proceeding intervened.

Even though the Stipulation was silent on the need for a building permit, state law requires anyone making repairs to a structure to have one, and, as noted above, the City would have had no authority to waive that requirement. A well-established principle of contract law is that "the laws in existence at the time a contract is executed are presumed by the parties to be part of the contract."^[102] In other words, the state law requirement that Mr. Dunn obtain a building permit before making repairs was a legally implicit part of the Stipulation that he signed. And it was therefore appropriate for the City building inspector to require that he have one and to prevent him from continuing with the repairs until he obtained one.

III. Neither the City Nor Mr. Dunn Can Enforce the Stipulation That They Signed in December 1998

A. The City cannot issue Mr. Dunn a building permit for the repairs described in the Stipulation.

As previously noted, the Stipulation affirmatively *directed* Mr. Dunn to proceed with the Tibbits repairs.^[103] But Tibbits repairs do not meet several requirements of the

State Building Code.^[104] Some of the deficiencies are procedural, such as furnishing the City building inspectors with two sets of project plans, and a nailing/bolting schedule. But others are substantive, namely, requiring the buildings to meet the 40-pound snow load requirement and providing them with a nonabsorbent floor.^[105] Moreover, those additional requirements are not legally implicit in the Stipulation, as is the case with the requirement to obtain a building permit. The plans attached to the Stipulation directly contradict what is in the State Building Code. And a preponderance of the evidence established that the parties intended that Mr. Dunn only be required to do the repair work that is actually described in the Stipulation.^[106] What happened here is readily apparent. City officials negotiated and signed the Stipulation without first consulting with the City's building inspectors and obtaining their opinion about whether or not the proposed repairs met State Building Code requirements.^[107] For his part, Mr. Dunn had every reason to believe that the City officials with whom he was bargaining had consulted with their building inspectors and had secured the latter's agreement that the work met Code requirements.

B. The City cannot grant a variance from the State Building Code and has failed to take the steps required for a modification.

The City notes correctly that no case law directly addresses whether a municipality can grant a variance that diminishes the requirements of the State Building Code. Nevertheless, the City argues that the Stipulation is a *de facto* variance from the Code.^[108] *City of Minnetonka v. Mark Z. Jones Associates, Inc.*,^[109] dealt with the issue of whether or not a city could impose on a landowner more stringent requirements than those contained in the State Building Code. In ruling that a city could not, the Minnesota Supreme Court held that in requiring statewide application of the State Building Code, the legislature had preempted any inconsistent local regulation of structures.^[110] So, the question turns on whether the State Building Code itself allows for municipalities to grant variances. There is no local variance authority in the State Building Code. The closest thing is a provision that allows building inspectors to grant "modifications" in certain circumstances:

104.2.7 Modifications. When there are practical difficulties in carrying out the provisions of this code, the building official may grant modifications for individual cases. The building official shall first find that a special individual reason makes the strict letter of this code impractical and that the modification is in conformance with the intent and purpose of this code and that such modification does not lessen any fire-protection requirements or any degree of structural integrity. The details of any action granting modification shall be recorded and entered in the files of the code enforcement agency.^[111]

Here, there is no evidence that the City's building inspectors were ever asked to modify the Tibbits repairs, that they made the findings that the law requires for a modification, or ever issued a modification. To the contrary, the evidence established that the City's building inspectors were not involved in negotiating the Stipulation.

C. Since the Stipulation requires performance that violates the law, it is void.

So, in adopting the Stipulation, the City did not grant Mr. Dunn a variance from the State Building Code. And if Mr. Dunn were therefore to perform the repair work that the Stipulation explicitly directs him to perform, he would be violating the Code. Minnesota contract law incorporates the common law principle that a contract requiring performance that violates the law is void and of no effect.^[112] In some cases, where part of a contract is illegal and other parts are not, the law may consider the illegal part to be divisible, or severable, and enforce the remainder.^[113] But “[w]hether a contract is entire or severable turns on the intent of the parties, as objectively manifested by them.”^[114] And in determining the intent of the parties, one must consider “the language used, the subject matter of the contract, and how the parties themselves treated it.”^[115] Here, the main source of contention between the City and Mr. Dunn has always been how the damage to the structures from the 1997 spring storm would be repaired. The other issues, such as the neatness of the property, have always been incidental and peripheral.^[116] There is no evidence that the parties mutually intended some provisions of the Stipulation to be enforceable even if others were not. So the ALJ concludes that the provisions are not divisible, and that the illegal repair provision voids the entire Stipulation.

V. Mr. Dunn Has Substantially Complied With His Conditional Use Permit

A. Interpreting the meaning of the conditional use permit

The conditional use permit that the City Council issued for the subject property contained nine conditions,^[117] only three of which are arguably at issue here, namely:

- * * *
- 2. The property to be kept in neat condition
- * * *
- 5. No outside storage
- * * *
- 6. No repairs and maintenance to be done at this location^[118]

The Minnesota Supreme Court has indicated that although styled as a “permit,” a “conditional use permit is in the nature of a contract between the city and a private party for the use of a piece of property.”^[119] So, when a city acts to revoke a conditional use permit for noncompliance with a condition attached to the permit, it is in the nature of an action for breach of contract.^[120] The second major issue presented in this proceeding is whether Mr. Dunn has failed to comply with one or more of the conditions in his conditional use permit. To determine whether there has been noncompliance on Mr. Dunn’s part, one must first establish what each of these three conditions means. Unfortunately, there is some lack of clarity in all three conditions. In other words, all

three have ambiguities that must be resolved in order to determine whether or not Mr. Dunn has breached any of them.

When interpreting the conditional use permit to resolve the ambiguities, several legal principles combine to give preference to interpretations that are more favorable to Mr. Dunn than to the City. First, one of the general principles for interpreting contracts is that:

. . . where a contract is open to two interpretations, the one more favorable to the party who did not draft the instrument should be adopted in the absence of a clear showing that a contrary meaning was intended by the parties at the time of its execution.^[121]

Second, application of that general rule is even more appropriate when one of the parties, such as the City in this case, is in the position of being able virtually to dictate the terms to the other party. Mr. Dunn's predecessor in interest was not in a position to bargain with the City Council over the conditions that were to be incorporated into the conditional use permit. In such situations the Minnesota Supreme Court has held that:

[w]here there is unequal bargaining power between the parties so that one party controls all of the terms and offers the contract on a take-it-or-leave-it basis, the contract will be strictly construed against the party who drafted it.^[122]

Third, because exercises of a city's planning and zoning authority have the effect of impairing private property rights, they "should be construed strictly against the city and in favor of the property owner," and "[t]o be effective any restriction on land use must be clearly expressed."^[123]

Finally, the law permits the ALJ and the City Council to look beyond the language of the conditional use permit itself and consider other relevant evidence of what the language was intended to mean. When a written instrument, such as a contract or a conditional use permit, is unclear or ambiguous, extrinsic evidence of intent is admissible to resolve the ambiguity or lack of clarity and establish the meaning.^[124]

B. Mr. Dunn did not violate the condition prohibiting repairs and maintenance

Addressing the last of the pertinent permit conditions first, it is unclear from the language of the conditional use permit whether the City Council intended to prohibit the repair and maintenance of the boats that were being stored or of the structures in which the boats were being stored. Here, the surrounding circumstances and course of dealing between the parties suggests that the former interpretation is the correct one. At no time during the civil action in district court^[125] has the City claimed that the conditional use permit prohibited Mr. Dunn from attempting to repair the structures in question or that he has violated a permit condition by attempting to effect repairs. Moreover, Mr. Dunn testified that it was his understanding that the permit condition was

directed to the repair and maintenance of boats^[126] while the City presented no evidence at all about what the condition was intended to include. Finally, in the Stipulation that attempted to resolve the pending civil action, Mr. Dunn was actually directed to repair the structures.^[127]

Thus, the evidence suggests that nothing in the conditional use permit was intended to prevent Mr. Dunn from repairing the storage sheds on his land.^[128] In deciding between two possible interpretations of contract language, “[t]he construction which the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning.” Accordingly, the ALJ concludes that the conditional use permit itself does not prohibit Mr. Dunn from repairing the structures on the property.

C. Mr. Dunn substantially complied with the condition prohibiting outside storage of boats.

One of the City's building inspectors, Mr. Satek, testified that on more than one occasion he observed boats on the property that were not located in the storage structures.^[129] This raised the issue of whether Mr. Dunn had violated the conditional use permit by maintaining outside storage of boats on the property. In his testimony, Mr. Dunn made the distinction between outside “staging” and “storage” of boats. He stated that since the boats often needed to be stored in a particular sequence, some were typically staged temporarily outside of the turkey barns in the fall and again in the spring. He also stated that some boats were temporarily staged in the open while waiting to be transported for maintenance and service.^[130] This kind of temporary staging of boats in the open appears to have been an annual phenomenon since the property was first used for boat storage in 1982. And prior to the 1997 spring storm it never seems to have been an issue for the City. Based on this course of dealing, the ALJ concludes that the conditional use permit was not intended to prohibit annual and ordinary staging of boats for those purposes. On the other hand, Mr. Dunn conceded that one boat had remained in the open over one or more winters.^[131] He went on to indicate that the owner's attorney had directed him not to move it.^[132] There was no evidence that any other boats had been allowed to remain in the open for any significant period of time.

Strictly speaking, outside storage of that single boat violated Condition No. 5 of Mr. Dunn's conditional use permit. The question then turns to whether that instance of noncompliance warrants revocation of the permit. As previously noted, the Minnesota Supreme Court has indicated that it is appropriate to apply principles of contract law in dealing with conditional use permits.^[133] Here, Mr. Dunn essentially relies on the equitable doctrine of substantial performance to excuse him for allowing the one boat to be stored in the open. The Minnesota Supreme Court described that doctrine in *Ylijarvi v. Brockphaler*.^[134]

The duty under a contract is full and complete performance. In the case of building and construction contracts, the rule has been generally adopted that such duty is satisfied by substantial performance. It is not

necessary to decide whether the reason for the rule is that the rules requiring exact and literal performance of contracts is relaxed in the case of such contracts, or that substantial performance in such cases is, absent express manifestation to the contrary, the presumed intention of the parties, for the reasons that in the very nature of things literal performance as to all minutiae is often practically impossible and that the owner should not have without payment the benefits of, and the contractor should not forfeit, labor and materials expended in constructing essentially that for which the parties bargained.

We do not deem it necessary to define substantial performance at this time. For present purposes, it is sufficient to say that substantial performance means performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price. Deviations or lack of performance, which are either intentional or so material that the owner does not get substantially that for which he bargained, are not permissible.

In a more recent case involving substantial performance, the Minnesota Court of Appeals indicated that “[t]he application of the doctrine depends upon the fact situation of each case, and the nature and extent of the nonperformance are important facts to consider.”^[135] Here, the City did not allege in its Notice of Hearing that Mr. Dunn had failed to comply with the “no outside storage” provision of his conditional use permit. And the failure involved only a single boat out of the 110 to 115 boats that were stored each year. Finally, the City did not challenge Mr. Dunn’s testimony that he had been directed by the owner’s attorney to leave the boat where it was. For these reasons, the ALJ concludes that the doctrine of substantial performance is applicable to this alleged violation of the conditional use permit, and that Mr. Dunn did substantially perform Condition No. 5.

D. Mr. Dunn substantially complied with the condition requiring the property to be kept in neat condition.

Finally, the conditional use permit requires that the property “be kept in neat condition.”^[136] The permit does not further define the word “neat”, nor does it establish or incorporate any kind of objective standard for determining the requisite level of neatness. The term “neat” is therefore ambiguous, and its meaning must be interpreted. The primary aid to ascertaining the meaning of “neat” in this context is the course of dealing between the parties.

There was evidence that there was a certain amount of agriculture-related debris and trash on the property when the conditional use permit was granted in 1982.^[137] But that debris seems never to have been an issue between the City and Mr. Dunn before

the 1997 spring storm. The ALJ must therefore presume that the property with that kind of debris on it met the City's neatness standard. The partial roof collapse in the spring of 1997 created a great deal of additional debris. After the storm Mr. Dunn took his time removing that debris in order to avoid further damage to the boats beneath it.^[138] He initially stockpiled it and did not actually begin removing it from the property until the spring of 1998.^[139] A building inspector inspected the property in August 1998 but made no report concerning the presence of debris on the property.^[140] At the August 25, 1998, City Council meeting, Mr. Dunn stated that he had removed 120 tons of debris from the property and had about another 60 tons to remove.^[141] But there is nothing in the meeting minutes to suggest that the City considered his cleanup efforts inadequate at that point in time. Nor was the neatness of the property an issue that the City raised in the civil action that it brought against Mr. Dunn in late October 1998. In fact, the first time the City raised the issue of the property's neatness was in the Stipulation that ended the civil action in December 1998. In that Stipulation, Mr. Dunn agreed to:

. . . clean up his property and bring it into compliance with the City Code relating to the storage of debris, undergrowth, and other nuisance related issues, which cleanup shall be completed on or before July 30, 1999.^[142]

The evidence did not clearly establish when Mr. Dunn resumed his cleanup efforts after the winter of 1998-1999. It did establish that he had been keeping it neatly mowed since 1998.^[143] In June 1999 a City building inspector saw some debris on the property, consisting of cement blocks, wood pallets, gas tanks, a car, car batteries, scrap metal, and piles of wood.^[144] But it is uncertain how much of the debris was from the roof collapse or how much of it had been on the property before the 1997 spring storm. By the end of September 1999, there was still some debris on the property, but a large portion of it had been removed and none could be seen from the road.^[145] By the time of the hearing, the property was in neater condition than other similar properties within the City limits.^[146]

Looking at the issue of neatness in this context, the ALJ concludes that it was only the presence of debris from the roof collapse that brought the property below the standard of neatness that the City applies to other similar properties within its jurisdiction.^[147] Mr. Dunn had removed much, if not most, of that storm debris by the time the parties signed the Stipulation ending the civil action in December 1998. By September of 1999, the property again met the neatness standard that the City applies to other similar properties, and by the time of the hearing Mr. Dunn's property exceeded that standard. Implicit in the requirement that Mr. Dunn keep his property in a neat condition is that he would have a reasonable period of time in which to clean up the debris from the spring storm in 1997. The City gave him no notice that it considered his cleanup efforts too slow until the Stipulation of December 1999. He was not in a position to act on that until after the winter of 1998-1999. The City wanted the property cleaned up by the end of July 1999. Although the property was substantially neat by then, he did not actually complete the job until the time of the hearing in this matter. Taking all of this into consideration, the ALJ concludes that Mr. Dunn did substantially comply with Condition No. 2 of his conditional use permit.

Conditional use permits run with the land and remain in effect until their provisions are violated.^[148] For the reasons described above, the ALJ concludes that Mr. Dunn has substantially complied with the conditions of his conditional use permit and that it should not therefore be revoked. But there still remain questions about what the parties future rights, obligations, and options might be.

VI. Mr. Dunn Cannot Be Compelled to Bring Undamaged Portions of His Storage Barns Up to Code

The City's building inspectors have consistently taken the position that the City cannot issue a conditional use permit to use agricultural buildings for boat storage if the building does not meet current State Building Code requirements for storage buildings.^[149] But there is no such legal requirement either in state statute or rule or in City ordinance. The State Building Code only requires compliance when something is done to a structure — that is, if the structure is “erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted, or demolished.”^[150] In other words, the City's building inspectors were acting within their authority to require Mr. Dunn to obtain a building permit and to comply with the State Building Code in connection with any repairs made to the storm-damaged turkey barn. But they do not have the authority to require the undamaged turkey barn to be improved to meet Code requirements. And they only appear to have the legal authority to compel Mr. Dunn to do something to the damaged building (and thus require Code compliance) if it represents a “hazardous building” within the meaning of Minnesota law, namely:

. . . any building or property, which because of inadequate maintenance, dilapidation, physical damage, unsanitary condition, or abandonment constitutes a fire hazard or a hazard to public safety or health.^[151]

No evidence was presented at the hearing on whether or not the damaged turkey barn would meet the statutory definition of “hazardous building” if Mr. Dunn were to continue to use the undamaged portion of the building for boat storage. Nor is that self-evident from the evidence that was adduced. To the contrary, neither turkey barn was found to be hazardous from August of 1982 to the spring of 1997.

In summary, the legislature and the Commissioner of Administration appear to give municipalities the discretion whether to grant conditional use permits allowing former agricultural buildings to be used as boat storage buildings, so long as those buildings are not “hazardous” within the meaning of Minnesota law. But municipalities do not have discretion to allow repairs or alterations to such buildings unless the owner first obtains a building permit, which necessarily requires that any of the alterations and repairs comply fully with the requirements of the State Building Code.

VII. Conclusion and Recommendations

To summarize, in the ALJ's view the City cannot enforce the December 1998 Stipulation against Mr. Dunn because it calls for repair work that would violate the State Building Code. The ALJ also concludes that Mr. Dunn has substantially performed his obligations under the conditional use permit and that the City should not revoke it for noncompliance. On the other hand, Mr. Dunn is clearly not free to repair the structures on his property without a building permit and without complying fully with the State Building Code with respect to how repairs are made. What options, then, are now available to the parties?

The conditional use permit states that it may "be reviewed yearly"^[152] and therefore seems to suggest that the City may reconsider it on an annual basis. But there is no history of the City requiring the owner to make annual reapplications. And in the absence of an ordinance that limits the duration of the City's conditional use permits,^[153] such an interpretation seems at odds with the case law indicating that conditional use permits remain in force until the owner violates the conditions.^[154]

It therefore appears to the ALJ that there are three ways in which this matter could be resolved. First, the parties could renegotiate an agreement concerning repairs to the structures that do meet State Building Code requirements. Alternatively, the City could act to compel the removal of all or part of the storage barns as being hazardous structures.^[155] Finally, the City could allow the *status quo* to remain. Under the *status quo* Mr. Dunn could not store boats where the roof has fallen in because that would violate the condition prohibiting outside storage. He could, however, continue to store boats in undamaged parts of the storage barn, but he could not make repairs to them.

B. H. J.

^[1] The substantive provisions of the State Building Code can be found in Minn. R. pts. 1300.3900 to 1300.6300. Moreover, in Minn. R. pt. 1305.0010 the Commissioner of Administration has incorporated the provisions of the Uniform Building Code (UBC) into the State Building Code by reference.

^[2] Testimony of Toni Hirsch.

^[3] Testimony of Thomas Loucks.

^[4] i.e., Although the statutory term is building official, the commonly used term building inspector will be used here.

^[5] See Minn. Stat. § 16B.65, subd. 1. (Unless otherwise specified, all references to Minnesota Statutes are to the 1998 edition.)

^[6] Testimony of Bruce Satek.

^[7] Exhibit 1, pp. A-1 and A-2.

^[8] Exhibit 1 at p. A-2.

^[9] *Id.* at p. A-4.

^[10] Testimony of James Dunn.

- [11] Exhibit 1 at p. A-4.
- [12] Testimony of James Dunn.
- [13] *Id.*
- [14] *Id.*
- [15] *Id.*
- [16] *Id.*; see also Exhibit 1 at pp. B-18, B-21, and B-22.
- [17] Testimony of James Dunn.
- [18] Testimony of Thomas Loucks.
- [19] Testimony of Thomas Loucks; Exhibit 1 at p. B-2.
- [20] Exhibit 1 at p. B-2.
- [21] *Id.*
- [22] Testimony of James Dunn.
- [23] Exhibit 1 at p. B-5.
- [24] See discussion in Part I of the Memorandum that follows.
- [25] Testimony of James Dunn.
- [26] Testimony of James Dunn.
- [27] Exhibit 1 at p. B-3.
- [28] *Id.*
- [29] *Id.*
- [30] Exhibit 1 at p. A-5.
- [31] *Id.*
- [32] *Id.*
- [33] Testimony of James Dunn; Exhibit 1 at p. B-4.
- [34] Exhibit 1 p. D-2.2.
- [35] Exhibit 1 p. D-2.2.
- [36] *Id.*
- [37] Testimony of James Dunn. Although Mr. Loucks recalled that the verbal agreement had been made in 1997, a preponderance of the evidence established that it occurred in August 1998. See the discussion in Part I of the Memorandum that follows.
- [38] Exhibit 1 at p. B-5.
- [39] Exhibit 1 at p. A-6.1.
- [40] See Minn. Stat. § 463.15.
- [41] Exhibit 1 at p. A-6.1.
- [42] Testimony of James Dunn
- [43] Testimony of Thomas Loucks; Exhibit 1 at p. B-4.
- [44] Testimony of Bruce Satek; Exhibit 2.
- [45] Testimony of Thomas Loucks; Exhibit 1 at p. B-4 and Exhibit 2.
- [46] *Id.*
- [47] The Complaint actually alleged violations of the 1994 edition of the UBC, which the Commissioner of Administration has incorporated into the State Building Code by reference. (See Minn. R. pt. 1305.0010.)
- [48] Exhibit 2.
- [49] Exhibit 1 at pp. A-7 through A-15.

[50] Testimony of Thomas Loucks, Toni Hirsch, and Bruce Satek; Exhibit 2.

[51] Testimony of James Dunn.

[52] Exhibit 1 at p. B-6.

[53] *Id.*

[54] Testimony of James Dunn and Bruce Satek.

[55] Testimony of Bruce Satek.

[56] Exhibit 1 at p. B-7

[57] Testimony of Bruce Satek; Exhibit 1 at pp. B-9 and B-17 through B-21.

[58] Testimony of Bruce Satek; Exhibit 1 at p. B-9.

[59] Testimony of James Dunn.

[60] *Id.*

[61] Exhibit 1 at pp. B-12 and B-13.

[62] Exhibit 1 at p. B-10.

[63] Compare Exhibit 1, pp. A-10 through A-16 with p. B-10.

[64] Exhibit 1 at pp. C-1 through C-11.

[65] Exhibit 1 at p. A-16.

[66] Exhibit 1 at p. B-16.

[67] Exhibit 1 at p. B-15.

[68] Testimony of Bruce Satek.

[69] *Id.*

[70] Testimony of Thomas Loucks.

[71] Minn. Stat. §§ 14.55.

[72] Minn. Stat. §§ 462.351 through 462.365.

[73] Minn. Stat. § 462.352, subd. 2.

[74] See Minn. Stat. § 462.3595, subd. 1 and City of Independence Ordinance No. 88G, adopted on July 13, 1982, and amending City Ordinance No. 88.

[75] Minn. Stat. § 462.3595, subd. 3.

[76] Minn. Stat. § 16B.62, subd. 1.

[77] Minn. R. pt. 1300.2300.

[78] UBC § 104.2.7.

[79] See *Metropolitan Sports Facilities Com'n v. General Mills, Inc.*, 460 N.W.2d 625, 629 (Minn. App. 1990, aff'd, 470 N.W.2d 118 (Minn. 1991)).

[80] See the discussion in Part IV of the Memorandum that follows.

[81] See the discussion in Part V of the Memorandum that follows.

[82] Minn. Stat. § 463.15.

[83] Minn. Stat. § 463.16.

[84] See UBC § 104.2.7.

[85] Minnesota Statutes, section 14.62, subdivision 1.

[86] Exhibit 1 at pp. B-1 and B-2.

[87] Also, Mr. Dunn testified that he was no longer living at that address at that time so that no correspondence from the City would have reached him there.

[88] Testimony of Thomas Loucks.

- [89] Testimony of James Dunn.
- [90] Exhibit 1 at p. B-3. Although there is no direct evidence that establishes the date of that inspection, a handwritten notation on the City's copy of that letter indicates that the City had taken pictures of the subject property in March 1998.
- [91] Minn. Stat. § 16B.62, subd. 1.
- [92] Minn. Stat. § 16B.61, subd. 1.
- [93] Minn. R. pt. 1300.2300. The substantive provisions of the State Building Code can be found in Minn. R. pts. 1300.3900 to 1300.6300. Moreover, in Minn. R. pt. 1305.0010 the Commissioner has incorporated the provisions of the Uniform Building Code into the State Building Code by reference.
- [94] Minn. Stat. § 16B.62, subd. 1 and Minn. R. 1300.2100, subp. 2.
- [95] Exhibit 1, p. A-4.
- [96] Minn. Stat. § 16B.60, subd. 5.
- [97] UBC § 106.1.
- [98] See the discussion on permissibility of variances in Part III-B., below.
- [99] Exhibit 2.
- [100] Exhibit 1 at pp. A7 through A15.
- [101] *Jallen v. Agre*, 119 N.W.2d 739, 743 (Minn. 1963).
- [102] *Metropolitan Sports Facilities Com'n v. General Mills, Inc.*, 460 N.W.2d 625, 629 (Minn. App. 1990, aff'd, 470 N.W.2d 118 (Minn. 1991)).
- [103] Exhibit 1 at p. A7 and A8.
- [104] Testimony of Bruce Satek; Exhibit 1 at p. B-10.
- [105] *Id.*
- [106] Testimony of Toni Hirsch and James Dunn.
- [107] Testimony of Toni Hirsch and Bruce Satek.
- [108] Memorandum for City of Independence (City's Memorandum) at p. 5.
- [109] 236 N.W.2d 163 (Minn. 1975).
- [110] *Id.* at 167.
- [111] UBC § 104.2.7.
- [112] *Northern Pac. R. Co. v. Thornton Bros. Co.*, 288 N.W. 226, 227 (Minn. 1939); see, most recently, *Barna, Guzy & Steffen v. Beens*, 541 N.W.2d 354, 356 (Minn. App. 1996).
- [113] *Hartford Acc. & Indem. Co. v. Dahl*, 278 N.W. 591 (Minn. 1938)
- [114] *Schultz v. Stiernagle*, 270 N.W.2d 269, 271 (Minn. 1978)
- [115] *Anderson v. Kammeier*, 262 N.W.2d 366, 370 (Minn. 1977); see also *Autry v. Trkla*, 350 N.W.2d 409, 413 (Minn. App. 1984).
- [116] Whether delays in cleaning up debris also violated Mr. Dunn's conditional use permit is a separate issue. See Part V-D, below.
- [117] See Finding of Fact No. 5.
- [118] Exhibit 1 at p. A-4.
- [119] *State v. Larson Transfer & Storage, Inc.*, 246 N.W.2d 176, n. 4 at 182 (Minn. 1976).
- [120] *Id.*
- [121] *Wick v. Murphy*, 54 N.W.2d 805, 809 (Minn. 1952); see also *Untiedt v. Grand Laboratories, Inc.*, 552 N.W.2d 571, 574 (Minn. App. 1996), *review denied*.
- [122] *Atwater Creamery Co. v. Western Nat. Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985).

^[123] *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984).

^[124] See *Scherger v. Northern Natural Gas Co.*, 575 N.W.2d, 578 580 (Minn. 1998) (involving interpretation of an easement).

^[125] See Exhibit 2.

^[126] Testimony of James Dunn.

^[127] Exhibit 1 at pp. A-7 through A-15.

^[128] This, of course, is a separate question from whether Mr. Dunn is required to obtain a building permit before making any repairs. See Part VI, below.

^[129] Testimony of Bruce Satek; see *also* Exhibit 1 at pp. B-9 and B-17 through B-19.

^[130] Testimony of James Dunn.

^[131] *Id.* (That boat is depicted in the photographs seen in Exhibit 1 at pp. B-17 through B-19.)

^[132] *Id.*

^[133] See *Larson Transfer & Storage, supra*.

^[134] 7 N.W.2d 314, 318 (Minn. 1942).

^[135] *Voight v. Jones*, 404 N.W.2d 830, 834 (Minn. App. 1987).

^[136] Exhibit 1 at p. A-4.

^[137] Testimony of James Dunn.

^[138] *Id.*

^[139] *Id.*

^[140] Exhibit 1 at p. B-5.

^[141] Exhibit 1 at p. A-6.1.

^[142] Exhibit 1 at p. A-8.

^[143] Testimony of Thomas Loucks.

^[144] Exhibit 1 at B-6.

^[145] Testimony of James Dunn; Exhibit 1 at pp. B-17 through B-21.

^[146] Testimony of Bruce Satek.

^[147] The City concedes that the use of the property was “uneventful until the spring of 1997. (City’s Memorandum at p. 1).

^[148] *Dege v. City of Maplewood*, 416 N.W.2d 854, 855 (Minn. App. 1987)

^[149] Testimony of Bruce Satek; see *also* the notation on Exhibit 1 at p. B-4.

^[150] UBC § 106.1; see also Minn. R. pt. 1300.2300.

^[151] Minn. Stat. § 463.15.

^[152] Exhibit 1 at p. A-4.

^[153] See, for example, *State by Minneapolis Park Lovers v. City of Minneapolis*, 469 N.W.2d 566 (Minn.App. 1991), *review denied*.

^[154] See *Dege v. City of Maplewood, supra*.

^[155] See Minn. Stat. § 463.16. As previously indicated, the City did not allege a violation of the hazardous building statute in the Notice of Hearing, nor did it attempt to make a factual record on whether or not the structures in question meet the statutory definition of “hazardous.”